APPENDIX "A"

"PER CURIAM: This action arises under the Federal Tort Claims Act.[1] The District Court found the Government employee negligent in following the plaintiff's automobile too closely, but the plaintiff also negligent in failing to signal her intention to make a right turn and in swerving to the left before making that turn. It further found that the negligent operation of the automobile by the plaintiff proximately contributed to the collision and resultant injuries and damages. After carefully studying the testimony and exhibits, we hold that such findings are not clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure.

The Government furnished to the plaintiff's attorneys such statements of witnesses, photographs, and sketches as they requested, but the Court declined to permit plaintiff's counsel to inspect the official investigation and report of the accident. In so ruling, the Court did not abuse its discretion. *Hickman* v. *Taylor,* 1947, 329 U.S. 495.

Finding no error in the record, the judgment is

AFFIRMED."

A true copy

Test: /s/ EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

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[1] 28 U.S.C.A. § 1346, et seq., § 2671, et seq.

APPENDIX "B"

(Number and title omitted)

(Filed: February 20, 1958)

The above-styled cause, coming on to be heard, was tried by the Court without a jury on February 18, 1958, upon the issues made up by the pleadings and proof. Upon a consideration of the evidence, consisting of the oral testimony of several witnesses, the exhibits, the stipulations and admissions of the parties, as reflected by this Court's pre-trial order entered in this cause on January 27, 1958, and the defendant's answers to the plaintiff's interrogatories filed with the Clerk of this Court in this cause on January 28, 1958, this Court now proceeds in this memorandum opinion to make and enter the appropriate findings of fact and conclusions of law.

The Plaintiff in this action claims under the Federal Tort Claims Act (28 U.S.C.A. 1346(b), 2674, and Chapter 171 of Title 28 of the United States Code) of the United States of America the sum of $28,000 as damages for permanent personal injuries, incidental hospital, medical and doctors' expenses, and loss of compensation from her work, all as a proximate consequence of the negligence of Frank H. Collins, an agent of the United States, in the operation of a motor vehicle within the line and scope of his agency, by running the Government vehicle into the back of the automobile being driven by the plaintiff at or near the intersection of Bell and Eugene Streets on the 16th day of February, 1957, in the City of Montgomery, Alabama. To this complaint, the defendant entered a plea of the general issue and an affirmative plea of contributory negligence.

It was stipulated by and between the parties that the accident occurred on February 16, 1957, at the place alleged by the plaintiff. It was further stipulated that at

this time and place the plaintiff, a 59-year-old woman, of Montgomery, Alabama, was operating an automobile on Bell Street at or near the intersection of Bell Street with Eugene Street; that she was immediately prior to the time of the accident operating this automobile by driving same in a westerly direction along Bell Street; that Frank H. Collins, an airman in the employment of the United States, while acting within the scope of his employment, was at that time and place operating a motor vehicle owned by the United States, and while driving the said motor vehicle within the scope of his agency, in the same direction as the plaintiff was driving along Bell Street, had a collision with the automobile being driven by the plaintiff at that time and place. This collision is the basis for this action.

From the testimony of the witnesses and the photographs of the vehicles involved taken shortly after the accident, it appears that the right front fender of the vehicle being driven by Airman Collins struck the left rear fender and bumper of the plaintiff's automobile, that was being driven by the plaintiff. It appears further that the impact was not a severe one, causing only slight damage to the left rear fender of plaintiff's automobile and not, to any perceptible extent, even bending the bumper on plaintiff's automobile. The court finds that at the time of the impact the automobile being driven by Airman Collins was traveling at a speed of from ten to fifteen miles per hour and that the speed of the automobile being driven by the plaintiff, and being turned to the right on Eugene Street off Bell Street, was from five to ten miles per hour. Regardless of the speed of the vehicles at the time of the impact, the plaintiff's automobile accelerated immediately after the impact, went all the way across Eugene Street, and stopped at an angle on a bank approximately sixty feet from the point of impact. This Court finds that immediately prior to the impact the driver of the

defendant's automobile, Collins, had been, for several car lengths, following the vehicle being driven by the plaintiff at a distance of approximately ten feet. The automobiles at this time were each traveling at some fifteen to twenty miles per hour. As the cars, traveling in this position and at this speed, approached the point where Eugene Street intersects Bell Street from the north, the plaintiff without giving any indication or signal and by swerving into the left lane of traffic (there were two lanes of traffic in each direction along Bell Street) slowed her automobile from its speed of from fifteen to twenty miles per hour to approximately five miles per hour and commenced a turn to the right onto Eugene Street, which was a turn of more than ninety degrees. The driver of the defendant's vehicle, because he was following too closely and because he had received no signal of the plaintiff's intention to turn, was unable to stop; and, because the plaintiff had swerved into the left lane of traffic, traveling in a westerly direction on Bell Street, he was unable to miss the plaintiff's car, as he attempted to do by swerving to the left.

This Court finds specifically that the driver of the defendant's vehicle in following the plaintiff's vehicle, as above related, immediately prior to this accident was guilty of negligence and was operating his vehicle in violation of Title 36, § 15 of the 1940 Code of Alabama, and Chapter 18, § 98 (b) of the 1952 City Code of Montgomery, Alabama. This Court also specifically finds that the plaintiff, according to her own testimony, failed to give the signal indicating she intended to turn to the right for the distance as required by § 87 (c), Chapter 18 of the 1952 City Code of Montgomery, Alabama. Her testimony to this effect, upon being questioned by the Court, was that she gave the signal, by the use of a mechanical blinker device, of her intention to turn for a distance not exceeding sixty feet, this distance being

estimated by the Court from the point the plaintiff designated across the courtroom. The plaintiff was, therefore, according to her own testimony, guilty of contributory negligence. See *Watts* v. *Montgomery Traction Co.*, 57 So. 471, 175 Ala. 102, and *Murphee* v. *Campbell*, 97 So. 2d 892.

This Court further specifically finds that the plaintiff, in swerving her automobile into the left lane, or the south lane for west-going traffic on Bell Street, as she turned to the north onto Eugene Street, was guilty of negligence and also violated § 16 of Title 36 of the 1940 Code of Alabama and § 56(a) of Chapter 18 of the 1952 City Code of Montgomery, Alabama. This Court further finds that the negligent operation of the automobile by the driver of the defendant, at the time and place of this accident, was a proximate cause of said accident and the injuries plaintiff complains of. However, this Court further finds that the negligent operation of the automobile that plaintiff was driving at the time and place in question proximately contributed to the collision, and, therefore, to her injuries and damages. Under the Alabama law which must be applied to this case, the fact that plaintiff is guilty of contributory negligence bars her recovery. *Mobile Light & R. Co.* v. *Baker*, (1908), 48 So. 119, 158 Ala. 491; *Chastain* v. *Brown*, (1955), 82 So. 2d 904, 263 Ala. 440; *Turner* v. *Atlantic Coast Line Railroad Company*, (5th CCA 1955), 222 F. 2d 337.

This Court concludes, as a matter of law, that it has jurisdiction of this controversy as the same is conferred by 28 U.S.C.A. §§ 1346(b), 2674, and Chapter 171 of Title 28 of the United States Code. This Court further concludes, as a matter of law, that because of plaintiff's negligence as herein related, which negligence proximately contributed to the accident which caused her injuries and damages, she is not entitled to recovery.

Judgment

In conformity with the foregoing findings of fact and conclusions of law, it is ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff have and recover nothing of the defendant and that the defendant is discharged. It is further ORDERED, ADJUDGED AND DECREED that the costs in this case be and they are hereby taxed against the plaintiff, for which execution may issue.

Done, this the 20th day of February, 1958.

/s/ FRANK M. JOHNSON, JR.
United States District Judge"

Order Denying Plaintiff's Motion to Vacate, Etc.

(Nmber and title omitted)

(Filed: March 19, 1958)

"This cause, coming on to be heard, was submitted to the Court upon the motion of the plaintiff made pursuant to Rule 52(b) and Rule 59 of the Federal Rules of Civil Procedure, seeking to have this Court amend its findings and vacate, set aside, alter or amend its judgment of February 20, 1958, or in the alternative to open the said judgment of February 20, 1958, and permit plaintiff to take additional testimony and to direct the entry of a new judgment in favor of the plaintiff. The plaintiff assigns numerous grounds in support of said motion. They may be summarized by stating that plaintiff claims the findings and conclusions of this Court, upon which the judgment of February 20, 1958, is predicated, are clearly erroneous, without substantial evidence to support them, based upon the Court's misapprehension as to the effect of the evidence, against the weight of the evidence, and contrary to the truth and right of the case.

Upon a consideration of said motion, the arguments presented in support of and in opposition to same, a review of the testimony taken on the trial of this case, this Court is of the opinion that the most that can be said for the position plaintiff now takes is that the evidence was conflicting and may have supported a judgment had one been rendered in favor of the plaintiff. However, this Court is now more firmly convinced than ever before that the plaintiff was guilty of contributory negligence in that she, according to the weight of credible testimony, failed to give any signal or indication of her intent to turn, swerved into the left lane of traffic while slowing her automobile, in which lane the point of impact occurred, and if her testimony that she did give a signal would be believed, the signal was not given for the distance as required by the City Code of Montgomery, Alabama. Plaintiff's real contention is not with the findings and conclusions of this Court but with the law of the State of Alabama which holds that contributory negligence is a complete bar to recovery.

It is, therefore, for the foregoing reasons and for good cause shown, the ORDER, JUDGMENT AND DECREE of this Court that Plaintiff's motion made pursuant to Rule 52(b) and Rule 59 of the Federal Rules of Civil Procedure, seeking to have this Court amend its findings and to vacate, set aside, alter or amend its judgment of February 20, 1958, or in the alternative to open said cause and allow Plaintiff to take additional testimony, should be and the same is hereby overruled and denied.

Done, this the 19th day of March, 1958.

/s/ FRANK M. JOHNSON, JR.
United States District Judge"

APPENDIX "C"

28 U.S.C.A. § 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A. § 2671:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

'Federal agency' includes the executive departments, and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, § 124, 63 Stat. 106."

28 U.S.C.A. § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

1952 City Code of Montgomery, Alabama, Chapter 18, Sec. 87(c):

"A signal of intention to turn right or left when required shall be given continually during not less than the last one hundred feet traveled by the vehicle before turning."